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# Correspondence

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Dear Editors:

I was just perusing Volume 54, number 1 of the *Notre Dame Lawyer* and read with interest the Note respecting economic losses and products liability law.[1] The products liability area in general is of great interest to me, both from a philosophical point of view and from a practitioner's point of view. As a result, I find myself motivated to make a few comments on the Note (which, by the way, I thought was very well written).

The Note obviously springs from a particular takeoff point, i.e., that the expansion of product liability concepts in situations involving consumers is a desirable phenomenon. Even though I find myself representing manufacturers, I agree in general with that notion. However, I personally believe that the note also springs from certain notions that require at least some hesitation before endorsing them wholeheartedly.

I can readily appreciate the author's belief that the elimination of privity as a defense in the typical consumer situation was necessary (indeed, I believe, inevitable). However, I believe the author has engaged in a quantum jump when he proceeds from that premise to the premise that all cases involving all losses ought to sound in strict liability in tort so long as a consumer is involved.

Before deciding that that is a desirable objective, one must analyze what it means. The evolution of strict liability in tort has done far more than merely to remove privity as a defense (and I recognize that the author does appreciate that fact). Far more important than the elimination of privity as a defense is the elimination of negligence as a relevant inquiry. Thus, if a product results in injury, it is no defense that there was nothing which the manufacturer could have done to have eliminated the product "defect" which is found.

Thus, for example, in *Seely v. White Motor Company*,[2] plaintiff would prevail in a strict liability in tort setting so long as he could prove that the truck exhibited a defect without regard to any fault analysis. I readily concede that virtually every jurisdiction has now decided that it makes sense to spread the risk of loss to all consumers of trucks for costs attributable to personal injuries proximately caused by the defect in the *Seely* truck. I question, however, the wisdom of also requiring the manufacturer to spread the cost to all consumers of the risk of economic loss in the event that the *Seely* truck overturns, still without regard to fault.

The point I hope I am making is this. It may be that the author of the Note is correct that the question of the right to recover for economic loss should not turn on privity of contract. I suggest that it is something very different to contend that the consumer should recover for all conceivable economic losses, even in the absence of any personal injury, and in the absence of the showing of any *fault* on the part of the manufacturer, merely because the claimant can be labeled a "consumer." I do not believe that the Note fully examines that question.

1 Note, *Economic Losses and Strict Products Liability: A Record of Judicial Confusion Between Contract and Tort*, 54 NOTRE DAME LAWYER 118 (1978).

2 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

In a recent Illinois appellate court decision, *Rucker v. Norfolk and Western Railway Company,*[3] the well-written majority opinion suffers from the problems outlined above. It takes traditional strict liability in tort notions and extends them to situations not within their original intent. Moreover, it does this without any apparent recognition of the quantum jump which is being made. The court stated that "[w]e fail to see any practical distinction between the two types [manufacturing defect and design defect] of cases."[4]

The reason behind the evolution of strict liability in tort is, I believe, as follows. A particular manufacturer might put 1,000,000 items of a particular product into the stream of commerce. Despite having the best quality controls known to man, it is undisputed that five (to pick a number) of the 1,000,000 would contain manufacturing defects. If a person was injured by such a product, *admittedly* defective, the manufacturer denied liability in the past on the reasonable ground that he had *not* been negligent in any way. If he could prove that no feasible quality controls could have detected the five products containing the defect, he would not be responsible for the losses caused by the injury under traditional negligence standards.

Certain judicial commentators noted that the result was perhaps not the most desirable. They reasoned that it should be possible to predict in advance the number of injuries which might be caused by the five anomalous products. Thus, they reasoned, even though the manufacturer was wholly without fault, he was in a position to predict the injury costs and to include them in the price of the 1,000,000 products which he sold. That would presumably result in the creation of a system whereby the five unlucky injured victims could be compensated, with the cost being spread among the 1,000,000 purchasers of the product.

From that starting point, however, the notion of strict liability in tort has acquired a life of its own. It has been routinely applied to a myriad of factual patterns for which it was never intended. The *Rucker* case provides a good example.

There, the alleged product defect was in the design of a tank car. Thus, it existed not in five anomalous products but in the entire 1,000,000 products. Moreover, the manufacturer wished to present evidence that the product design was the only feasible design. Obviously, I have no idea whether that defense would or would not have proved valid. I do suggest that the manufacturer should be allowed to offer its proof. No manufacturer should be responsible for 1,000,000 of 1,000,000 products, absent a showing of fault. If the manufacturer is going to have to predict those costs in advance, and spread them among all consumers, the cost could be enormous. Moreover, there then ceases to be any incentive to improve products since *all* losses are risk-spread without regard to fault. I suggest that *Henningsen* never meant to reach that result.

Let me close with an illustration apropos to this subject. Let's assume for the moment that it is impossible to manufacture an automobile which will *always* start in cold weather. Let's assume that everyone who has ever had an

3 — Ill. App. —, 381 N.E.2d 715 (1978).
4 *Id.* at 724.

automobile which failed to start in cold weather were to bring a lawsuit for economic losses due to their inability to get to work on the day that their automobile refused to start. I might readily agree that the merits of those lawsuits should not turn on questions of privity. I firmly believe, however, that *regardless* of whether such actions sound in contract or in tort, the manufacturer should *not* be subject to strict liability. In the absence of any warranty that the automobiles would always start, and in the absence of any showing that the failure to start was attributable to negligence on the part of the manufacturer, I suggest that there should be no recovery.

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